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LEXANDER L STEVAS

# In the Supreme Court of the United States

OCTOBER TERM, 1983

FRANCHISE TAX BOARD OF CALIFORNIA, APPELLANT

V

UNITED STATES POSTAL SERVICE

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

### MOTION TO DISMISS OR AFFIRM

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## **QUESTION PRESENTED**

Whether a state agency may require the Postal Service to withhold sums from the wages of its employees to pay the employees' delinquent tax liabilities, when federal statutes providing for the enforcement of levies by state agencies permit the withholding only of anticipated tax liabilities.

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### MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16.1 of the Rules of this Court, the Solicitor General, on behalf of the United States Postal Service, moves that the appeal be dismissed or, in the alternative, that the judgment of the court of appeals be affirmed.

#### **OPINION BELOW**

The opinion of the court of appeals (Pet. App. 1-16) is reported at 698 F.2d 1029.

#### JURISDICTION

The judgment of the court of appeals was entered on February 10, 1983 (Pet. App. 1). A petition for rehearing was denied on June 3, 1983 (Pet. App. 26). A notice of appeal was filed on August 12, 1983 (Pet. App. 27). The Jurisdictional Statement was filed on August 31, 1983. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(2). We discuss this Court's jurisdiction at pages 7-8, infra.

#### STATEMENT

Appellant is an agency of the California state government. Under Cal. Rev. & Tax. Code § 18817 (West 1983), appellant may "require any employer \* \* \* having in [its] possession, or under [its] control, any credits or other personal property or other things of value, belonging to a taxpayer \* \* \* to withhold \* \* \* the amount of any tax. interest, or penalties due from the taxpayer \* \* \* and to transmit the amount withheld to" appellant. In 1978, appellant sought to collect delinquent personal income taxes from four Postal Service employees by serving "orders to withhold," pursuant to Section 18817, on the Postal Service. When the Postal Service declined to withhold the amounts sought by appellant from the employees' wages, appellant brought this action in the United States District Court for the Central District of California, seeking the amounts in issue. J.S. App. 7-8, 20-21.

The district court granted summary judgment in favor of the Postal Service. It based its ruling primarily on 5 U.S.C. 5517. Section 5517 specifies that when a state statute provides for taxes to be collected by withholding from employees' pay, the federal government shall, upon request by the state, "enter into an agreement with the State \* \* \* [which] agreement shall provide that the head of each agency \* \* \* shall comply with the requirements of the State

<sup>&</sup>lt;sup>1</sup>This action was consolidated with a suit against the Postal Service brought by another California state agency, the Employment Development Department, which sought to recover unemployment insurance taxes allegedly owed by contractors that had done work for the Postal Service. The district court ruled in favor of the Postal Service (J.S. App. 23-24), but the court of appeals reversed (id. at 2-7), and we have not sought further review.

withholding statute in the case of employees of the agency who are subject to the [state] tax \* \* \*." The district court noted that the agreement between California and the federal government provided only for the withholding of anticipated taxes and "does not require any collection of delinquent tax liabilities by federal officials in any manner whatsoever" (J.S. App. 23).

The court of appeals affirmed. It ruled that while Cal. Rev. & Tax. Code § 18817 can reach federal agencies, 5 U.S.C. 5517 "excused" the Postal Service from honoring appellant's orders to withhold because the agreement between California and the federal government "specifically states: '3. Nothing in this agreement shall be deemed: . . . (b) to require collection by agencies of the United States of delinquent tax liabilities of federal employees' "(J.S. App. 9-10). The court also noted that regulations implementing Section 5517 contain a similar limitation (J.S. App. 10, citing 31 C.F.R. 215.12(a)). The court accordingly held (J.S. App. 13):

In view of the agreements and regulations pursuant to the authorization of § 5517, federal cooperation with state withholding tax statutes is limited to current withholding from current wages to meet current anticipated tax liabilities of the federal employee. Withholding of wages of federal employees cannot be used to collect delinquent tax liabilities.

The court of appeals also rejected appellant's arguments that Section 5517 is no longer applicable to the Postal Service (J.S. App. 11-12), and that 39 U.S.C. 401(1), which provides that the Postal Service may "sue and be sued in its official name," authorized appellant's order to withhold (J.S. App. 13). Judge Schroeder dissented, reasoning that "[t]he federal courts have consistently held that [39 U.S.C.]

401(1) waives Postal Service immunity from state garnishment proceedings" and "[t]he statutory collection process in question here is essentially a garnishment procedure" (J.S. App. 15-16).

#### ARGUMENT

1. Appellant does not dispute the settled principle that a government agency cannot be subject to garnishment, attachments, or similar process - such as appellant's orders to withhold-unless Congress has waived the agency's immunity from suit. See FHA v. Burr, 309 U.S. 242, 244 (1940); Buchanan v. Alexander, 45 U.S. (4 How.) 20 (1846). But appellant contends (e.g., J.S. 8, 10, 23-24) that 39 U.S.C. 401(1), which states that the Postal Service may sue and be sued, is a waiver of sovereign immunity that permits the Postal Service to be served with appellant's orders to withhold. In support of this contention, appellant cites several court of appeals decisions that, appellant asserts, hold that Section 401(1) waives the Postal Service's immunity from post-judgment garnishments; appellant also notes, correctly, that the Postal Service will honor post-judgment garnishments (see, e.g., J.S. 8, 10-12, 16, 22-23).

Garnishments issued in aid of a law suit, however, are crucially different from appellant's orders to withhold. In FHA v. Burr, supra, which held that a statute providing that a federal agency may "sue and be sued" waived that agency's immunity from a garnishment issued to execute a final judgment, this Court explained (309 U.S. at 245-246 (footnotes omitted)): "[T]he words 'sue and be sued' in their normal connotation embrace all civil process incident to the commencement or continuance of legal proceedings. Garnishment and attachment commonly are part and parcel of the process, provided by statute, for the collection of debts. • • • To say that Congress did not intend to include

such civil process in the words 'sue and be sued' would in general deprive suits of some of their efficacy." See also Reconstruction Finance Corp. v. J. G. Menihan Corp., 312 U.S. 81, 85 (1941) ("[T]he words 'sue and be sued' normally include the natural and appropriate incidents of legal proceedings.").

In short, the Court interpreted the "sue and be sued" clause to permit post-judgment garnishments because garnishments are an incident of litigation. But appellant's orders to withhold have no such nexus to litigation. They are not "incident to the commencement or continuance of legal proceedings"; nor are they a "natural and appropriate incident[] of legal proceedings." They are issued by an administrative body, not a court. They are issued on the basis of an administrative — not a judicial — determination of liability. An order to withhold is, it appears, final agency action that will give rise to litigation only if another party seeks to challenge it. Its purpose is to facilitate the collection of taxes by an administrative agency, not to execute the judgment of a court or to give a court the opportunity to exercise its jurisdiction.

In all of these respects, appellant's "orders to withhold" resemble not garnishments but state requirements that anticipated tax liabilities be withheld. For that reason, the court of appeals was correct in concluding that 5 U.S.C. 5517 — which deals with agency orders designed to facilitate the administrative collection of taxes — rather than 39 U.S.C. 401(1) — which deals with judicial process — governs appellant's orders to withhold.

As both courts below ruled, the interpretation of Section 5517 is not in doubt. The State explicitly agreed with the federal government that Section 5517 does not authorize it to issue orders to withhold sums due if the purpose of those orders is to collect delinquent taxes. Since Section 5517 is the relevant waiver of sovereign immunity, and it does not

authorize appellant's orders to withhold, it follows that appellant may not enforce its orders to withhold against the Postal Service.

The unadjudicated delinquent tax liabilities that appellant seeks to collect will often be disputed by the taxpayer. It can be expected that Postal Service employees would frequently insist that appellant has calculated their tax delinquencies incorrectly, or that they are not liable for delinquent taxes at all. By contrast, the amounts that are to be withheld for anticipated tax liabilities, and the amount of a judgment entered by a court and enforced by garnishment, will seldom be in serious dispute. It was entirely reasonable for Congress to decide not to embroil government agencies in the disputes that inevitably will occur when states seek to collect delinquent taxes by administrative order, while authorizing federal agencies to withhold the generally uncontroversial sums involved in anticipated tax liabilities and the enforcement of judgments entered by courts.

For these reasons, the judgment of the court of appeals should be affirmed.<sup>2</sup>

<sup>&</sup>lt;sup>2</sup>Appellant asserts (J.S. 10-11) that other Ninth Circuit decisions have treated its orders to withhold as the equivalent of post-judgment garnishment. But the case cited by appellant —Randall v. Franchise Tax Board, 453 F.2d 381 (9th Cir. 1971) —merely ruled that an order to withhold was lawful under the Due Process Clause for some of the same reasons that a garnishment is lawful under that Clause (see 453 F.2d at 382). That ruling sheds no light on the question in this case, which concerns not the Due Process Clause but the interpretation of statutes waiving sovereign immunity.

Appellant also suggests (J.S. 13) that 5 U.S.C. 5517 may no longer apply to the Postal Service. This contention was answered by the court of appeals (J.S. App. 11-12). Indeed, the court of appeals noted that the Postal Service continues to withhold—for the benefit of the State—anticipated state taxes from its employees under the regulations and agreements issued pursuant to Section 5517. If an employee were to challenge the Postal Service's authority to withhold such taxes, we expect the State would vigorously contend that the regime established under Section 5517 does continue to apply to the Postal Service.

2. This case is not within this Court's appellate jurisdiction. Appellant relies on 28 U.S.C. 1254(2), which gives the Court jurisdiction over an "appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States \* \* \*." The court of appeals' holding, however, is best interpreted not as a ruling that Cal. Rev. & Tax. Code § 18817 is unconstitutional but as a ruling that that statute, as interpreted by the State, does not authorize the issuance to the Postal Service of withholding orders designed to collect delinquent taxes. See generally Fornaris v. Ridge Tool Co., 400 U.S. 41, 42 n.1 (1970) (28 U.S.C. 1254(2) is to be narrowly construed).

The court of appeals never stated that the California statute was preempted by 5 U.S.C. 5517 or is otherwise unconstitutional. Instead, the court of appeals relied heavily on the agreement between state and federal authorities that implemented Section 5517. That agreement reflects an understanding - shared by both state and federal officials -that a state statutory collection scheme for delinquent taxes that requires withholding from employees' pay does not apply to federal employees. As the court of appeals noted, this interpretation of state law is not compelled by the language of Section 18817. But it is the interpretation to which state officials agreed, and the court of appeals did no more than require state officials to adhere to their own interpretation of the state statute. In fact, even in the Jurisdictional Statement the State has not repudiated the interpretation embodied in its agreement with the federal government (see J.S. 11).

Indeed, Section 5517 specifies that the agreement adopted by state and federal officials pursuant to that statute "shall provide that the head of each agency of the United States shall comply with the requirements of the State withholding

- statute \* \* \*." The agreement must, therefore, be regarded as embodying an agreed-upon interpretation of the requirements of state withholding statutes. It would be peculiar to say that Section 5517, which explicitly enjoins federal officials to comply with state statutory requirements, has preempted a state statute.
- 3. If appellant's Jurisdictional Statement is considered a petition for a writ of certiorari (see 28 U.S.C. 2103), it should be denied. Appellant does not identify any conflict among the circuits.<sup>3</sup> Appellant asserts, as we noted, that the court of appeals' decision is inconsistent with decisions holding that judicial garnishment orders may be served on the Postal Service. But we have explained (pages 4-6, supra) why there is no inconsistency; garnishments ancillary to judicial process are different in significant respects from administrative levies. Moreover, since the Postal Service will honor a garnishment order obtained by appellant after it reduces a tax debt to judgment, the practical significance of the court of appeals' decision is limited.

Indeed, the United States District Court for the Eastern District of Michigan recently followed the court of appeals' decision in this case and held that the Postal Service is not amenable to a Michigan tax collection procedure similar to appellant's. Michigan Department of Treasury v. United States Postal Service, Civil No. 82-71085 (Sept. 28, 1983).

#### CONCLUSION

The appeal should be dismissed for lack of jurisdiction. If the Jurisdictional Statement is treated as a petition for a writ of certiorari, the Petition should be denied. Alternatively, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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